HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER

RAILROAD RATE REGULATION AND SUIT AGAINST A STATE. — In a much forecasted decision the Supreme Court of the United States recently dealt an effective blow to a type of legislation which has been very prevalent recently. The legislature of Minnesota fixed rates for the railroads of the state, and prescribed heavy penalties of fine and imprisonment for each deviation therefrom. The federal circuit court enjoined the state attorney-general from proceeding under these statutes pending the decision of their constitutionality.[1] He disobeyed the injunction, whereupon the circuit court committed him for contempt. Alleging that the court was without jurisdiction to enjoin him, he instituted *habeas corpus* proceedings in the Supreme Court, but his petition was dismissed. *Ex parte Young*, March 23, 1908. The court took two steps: it found that the statutes were unconstitutional, and that the court had jurisdiction to issue the injunction. Regardless of the sufficiency of the rates, the court declared that the statutes violated the Fourteenth Amendment because, in effect, they prohibited a test of their validity, when the validity depended "upon the existence of a fact which can be determined only after investigation of a very complicated and technical character." Disobedience would involve the risk of such long imprisonment that agents would not disobey to test the validity; and if agents would take the chance, the railroads would run the risk of incurring in a day fines which would bankrupt them. This ground for overthrowing a statute is very uncommon.[2] Disobeying the statute, and then defending a prosecution on the ground of its unconstitutionality would

[1] For a discussion of this mode of proceeding, see 20 HARV. L. REV. 238.

[2] Cotting *v.* Kansas, etc., Co., 183 U. S. 79, 100; *Ex parte* Wood, 155 Fed. 190, 196. See also the claim of the plaintiff, apparently unnoticed by the court, in Fitts *v.* McGhee, 172 U. S. 516, 517.

involve all the deterring risk that the court points out. But this very decision suggests another method of procedure — restraining the enforcement of the statute. This method is less burdensome, but it still has insurmountable drawbacks. If the company obeys the statute while the action is pending, it suffers irreparable injury if the rate is confiscatory. If it disobeys during this interval, it runs the risk of enormous fines, for if the rate is not confiscatory, the restraining order only postpones the suits under the statute.[3]

Most of the opinion was devoted to a re-examination[4] of the question, whether the proceedings to enjoin the attorney-general constituted a suit against the state within the prohibition of the Eleventh Amendment. The Supreme Court has at various times adopted different constructions of this Amendment, from the strictest, that a suit is one against a state only when a state is a defendant of record,[5] to the loosest, that its object is to prevent a state from being subject to coercive judicial process at the instance of an individual.[6] A sound method of attacking the question was recently suggested in an address by Mr. William D. Guthrie.[7] He adopted the English analogy of the Crown's immunity from suit with its complement, so essential to prevent injustice, of the responsibility as principal of the agent through whom it acted.[8] The Amendment would seem to be satisfied if we give the state the immunity of the Crown. That construction would still leave its officers liable as responsible principals, thus affording individuals in this country the protection of their rights enjoyed by Englishmen. Our courts should hold officers personally liable when their acts constitute an illegal invasion of an individual's rights, remembering that under our theory of government an unconstitutional statute cannot legalize.[9] Then, logically, equity should give its preventive relief when a threatened act would irreparably injure the plaintiff.[10] However, we should observe this limitation, which has nothing to do with the Eleventh Amendment but is often confused with it: if the state is not joined when it is a necessary party in view of the relief demanded, the suit should fail because of the defect of parties defendant.[11] It is believed that practically all of the actual holdings[12] of the Supreme Court will be found reconcilable with the view thus outlined, and also most of the reasoning it has advanced at various times. Attorney-General Hadley, in arguing against the right of a federal court to enjoin

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[3] This is on the assumption that the court cannot legalize what the legislature has constitutionally declared illegal. The railroads, in another way also, are very badly off, for they were enjoined from obeying the statutes, the disobedience of which may later bring punishment upon them.

[4] In late years the court has allowed such injunctions with little or no discussion of the question. Prout *v.* Starr, 188 U. S. 537. See Fargo *v.* Hart, 193 U. S. 490.

[5] Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 857.

[6] *In re* Ayers, 123 U. S. 443, 505.

[7] Reprinted in 8 Colum. L. Rev. 183–207.

[8] Feather *v.* The Queen, 6 B. & S. 257, 296; 2 Goodnow, Comparative Administrative Law, 163 *et seq.*

[9] See Kilbourn *v.* Thompson, 103 U. S. 168; *In re* Tyler, 149 U. S. 164; Scott *v.* Donald, 165 U. S. 58; Tindal *v.* Wesley, 167 U. S. 204.

[10] Virginia Coupon Cases (Allen *v.* Baltimore & Ohio R. R.), 114 U. S. 311; Scott *v.* Donald, 165 U. S. 107; Mechem, Public Officers, § 995. Some cases apparently *contra* may be reconciled on the ground that the defendant is not threatening to do the act. See Fitts *v.* McGhee, *supra.*

[11] Osborn *v.* U. S. Bank, *supra*, 858; Christian *v.* Atlantic, etc., Ry., 133 U. S. 233. The court will sometimes go a long way not to hold the state a necessary party. Cunningham *v.* Macon, etc., R. R., 109 U. S. 446, 451.

[12] See 20 HARV. L. REV. 245.

a state attorney-general from enforcing a state statute violating the Fourteenth Amendment, propounds this dilemma: if his action is not state action, the Fourteenth Amendment does not apply; while if it is state action, the Eleventh Amendment forbids the suit.[13] The following is submitted in answer. The issue between the parties is whether the threatened act of the defendant has legal sanction, which depends on whether or not this is state action. That in turn depends on the constitutionality of the act, which is a federal question giving the federal courts jurisdiction of the suit, and thus they may enjoin in accordance with equitable principles.

LIABILITY FOR RECEIVERSHIP EXPENSES. — It is within the discretion of the court to appoint a receiver, to determine his compensation, and to fix the manner in which that compensation shall be paid. The court through its receiver administers the estate for the benefit of those ultimately adjudged entitled to it. Receivership expenses, however, differ from ordinary costs in that the administration is supposed to be worth its cost to the true owner,[1] and accordingly the general rule is that the receivership expenses are to be taken from the fund administered.[2] The difficult problem is to determine when the facts justify such a departure from the general rule as to relieve the owner of the expenses of an involuntary management and place the burden on the party who instituted the proceedings. It may, indeed, be impossible to charge the fund because the possession of the receiver was never legal, as when his appointment was absolutely void because of a statute,[3] or when the property in question belongs to one not a party to the action.[4] In such case it is clear that the true owner cannot be forced to submit to a reduction of the fund to pay the expenses of the illegal administration. As the receiver is equally innocent, it seems equitable to charge the expenses to the person who caused the appointment of the receiver.[5] If, on the other hand, the appointment of the receiver under the circumstances was legal and proper, or, if erroneous, was acquiesced in by the defendant, the mere fact that the plaintiff eventually failed in his suit will not be enough to throw the expense on him.[6] If, however, the plaintiff was fraudulent, there can be no objection to making him stand the cost.[7] A more difficult class of cases is where the appointment was not justified on the facts presented and was vacated on appeal. The courts have reached all possible results on the liability for the receivership expenses incurred in the interim.[8] It is submitted that the proper rule is first to protect the receiver by giving him a lien on the fund and then to let the

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[13] 66 Cent. L. J. 71, 74, 75.

[1] See Porter *v.* Sabin, 149 U. S. 473, 479.

[2] Jaffray *v.* Raab, 72 Ia. 335.

[3] Couper *v.* Shirley, 75 Fed. 168.

[4] Howe *v.* Jones, 66 Ia. 156.

[5] Ephraim *v.* Pacific Bank, 129 Cal. 589.

[6] Ferguson *v.* Dent, 46 Fed. 88. But see City of St. Louis *v.* St. Louis Gas Light Co., 11 Mo. App. 237.

[7] Highley *v.* Deane, 168 Ill. 266.

[8] Receiver has no hold on the fund, Pittsfield Bank *v.* Bayne, 140 N. Y. 321; receiver has a lien on the fund, Espuela, etc., Co. *v.* Bindle, 11 Tex. Civ. App. 262; all expenses should be taxed against the plaintiff, Myres *v.* Frankenthal, 55 Ill. App. 390; running expenses should be taxed on the fund, but the receiver's commissions on the plaintiff, French *v.* Gifford, 31 Ia. 428.